IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.241/2003

1. Smt. Stayavati T. Naik,
2. Mr. Ashok T. Naik,
3. Mrs. Pushpalata T. Naik,
4. Shri Kishor T. Naik,
5. Smt. Usha Kishor Naik,
(Petitioner Nos.4 & 5 transposed
as respondents No.7 & 8 as per
Order dated 2/5/03)

All major in age,
R/o. Siolim, Bardez, Goa. .... Petitioners.

V/s.

1. Mr. Hari Nilkant Falari,
major, businessman,
R/o. Dattawadi, Mapusa, Goa.

2. Shri Vassudev Naik
(since deceased through his heirs)
a) Smt. Kamalabai Vassudev Naik,
b) Shri Ramesh Vassudev Naiik,
c) Smt. Goadavari Ramesh Naik,
d) Shri Shrikant Vassudev Naik,
e) Smt. Indirabai Shrikant Naik,
All major in age,
Residents of Tarchi Bhat,
Siolim, Bardez, Goa.

f) Shri Amrutrao Y. Bhangui.
g) Smt. Sulbha Amrutrao Bhangui,
Both majoring age, resident of
behind Dr. Wagh's residence,
St. Pedro wado,
Rabandar, Tiswadi, Goa.

3. Shri Uday Tukaram Naik,
major in age, Near Mapusa Court,
Behind Paulo's House, Mapusa, Goa.

4. Shri Anand Tukaram Naik,

5. Shri Yogeshwar Tukaram Naik,
Both major in age,
Residents of Siolim, Tarchi Bhat,
Bardez, Goa.

6. Shri Shabi Tukaram Naik,
major in age, resident of
Ansabhat, Mapusa, Goa.

7. Smt. Shobha Ankush Naik,
8. Shri Kishor T. Naik,
9. Smt. Usha K. Naik,
both major, resident of
Siolim, Bardez, Goa. .... Respondents.

Mr. S. S. Kantak, Advocate for the petitioners.

Mr. M.B. D'Costa with Mr. J. A. Lobo, Advocates for respondent No.1.

CORAM : F.I. REBELLO, J.

DATE : JULY 3, 2003.

ORAL JUDGMENT :

Rule. The respondents waive service. Heard forthwith.

2. By the present petition, the petitioners seek to impugn order dated 11.11.2002 passed by the learned Civil Judge, Sr. Division, Mapusa in Civil Misc. Application No.170/99/A dismissing the petitioners' application under Section 47 of the Code of Civil Procedure in Execution Application No.48/99/A. To reduce the controversy, at the hearing of this petition, principally two challenges have been raised on behalf of the petitioners. Firstly that there were compromise terms filed in Execution Application No.6/94/A and in that execution application, the matter was compromised in terms of the compromise terms between the parties and consequently, the decree has been satisfied; and secondly interest awarded by the trial Court in the

final decree at the rate of 15 % per annum was without jurisdiction. The suit was instituted before the amendment to Section 34 by Amendment Act of 1976 when the jurisdiction of the Court to Award interest was only at 6 %. Having awarded the interest beyond 6 % that would be without jurisdiction and consequently, a nullity. It is, therefore, contended that it is open to the petitioners herein to raise the objections in the proceedings for execution. The trial Court though accepted the contention has, merely proceeded on the footing that the Apex Court has finally concluded the issue. It is contended that what amounts to a nullity at law can be challenged even in execution proceedings.

Learned Counsel for the Judgment Debtors/Petitioners has taken me through various proceedings, including the orders of the Apex Court to contend that the objections as raised will have to be finally allowed.

On the other hand, on behalf of the Decree Holders/respondents, it is contended firstly that the preliminary decree was passed on 21.1.1974. The final decree came to be passed only on 17.4.1989. The proceedings for execution were taken out even before the final decree, one of which was numbered as 6/74 and the other as 29/80. Consent terms were filed in respect of

what was in issue in execution application No.6/74 and that can be seen from the evidence of the Judgment Debtor Ashok T. Naik Salgaonkar himself wherein he refers that the compromise decree was only in execution No.6/74 and not in 29/80. Apart from that, it is pointed out that when the compromise terms were filed, the matter in appeal was pending before the Apex Court. The Apex Court reversed the Judgment of this Court and restored the Judgment of the trial Court. The compromise terms specifically do not set out that it is in satisfaction of the final decree. For all these reasons, it is contended that the said objection is devoid of merits and accordingly, should be rejected.

Dealing with the issue of interest, it is contended that the Judgment of the trial Court was in issue before this Court. This Court, in appeal, though reduced the amount, did not reduce the interest part. The matter went to the Apex Court. The Apex Court reversed the Judgment of this Court. The interest awarded was, however, maintained. A review came to be filed before the Apex Court in which also the aspect of interest was not raised. The only contention raised was the compromise. Apart from that, a specific challenge to awarding of interest by way of review was taken up before this Court. That application was rejected. In these circumstances, it is pointed out that once the

matter was in issue and has been answered and not challenged, it is not open to the parties to plead the issue that the Court could not have awarded the interest at more than 6 % in the proceedings in execution. The final decree was passed in 1989, by which time Section 34 had been amended and the Court had jurisdiction to award higher interest. Reliance is placed on the Judgment of the Apex Court in the case of Shree Hanuman Jute Mills and ors. v. Brij Kishore Kela and ors. 1987 (Supp) SCCs 61, to contend that it was open to the Court to grant more than 6% interest and in that case, the Apex Court considering the long pendency of the matter, awarded interest at 12 % though the proceedings had been taken out before the amendment to Section 34. It is also contended that once the issue was in issue, at least in the review petition filed before this Court and has been rejected, it was not open to the Civil Court to have allowed the objection to execution on the ground of interest. The Civil Court had jurisdiction. At the highest the decree suffers from an error of law, which could have been corrected by the High Court. Appeals were preferred, the High Court did not interfere with the awading of interest. For all the aforesaid reasons, it is contended that there is no merit in that contention, and consequently, the petition should be rejected.

3. Having heard the Counsel, the first issue is whether the first contention has any substance. In the first instance, as rightly pointed out, the decree dated 17.4.89 could not have been the subject matter of the compromise terms as it was taken out in the proceedings for execution much before passing of the final decree. Secondly, the compromise terms were filed in execution proceedings No.6/74, which was based on the preliminary decree. It is not necessary to go into that aspect as to how those proceedings were filed. The learned Counsel for the respondents, however, points out that there was a sale of some buses and that was sought to be apportioned between the parties by the compromise terms. At any rate, it is clear that the petitioners herein themselves understood that the compromise was only in one of the execution proceedings and not in other proceedings which were then pending and which were also taken out before final decree. What finally must go against the petitioners herein is that nowhere does the compromise decree set out that the compromise is in satisfaction of the decree. The compromise merely records that it is for the purpose of disposing of those proceedings in execution. Lastly the matter was before the Apex Court. When the Apex Court reversed the Judgment of this Court that issue could have been aggitated before the Apex Court. That was not raised. It is only in the review which was filed before the Apex

Court, it was sought to be contended that the decree has been compromised. The Apex Court while disposing of the review merely stated that if there is a compromise between the parties in execution proceedings, the compromise even after the Judgment of the Apex Court may bind the parties. This does not mean that the Apex Court has stated that the compromise between the parties was the compromise in satisfaction of the decree. That could have been, if after the final decree of 1989, execution proceedings had been taken out and if there was compromise, which compromise was in satisfaction of the final decree. That was not so. For the aforesaid reasons, I find no error apparent in the Judgment of the trial Court and consequently, the first objection has to be rejected.

4. Coming to the second contention, namely awarding of interest, the position before the amendment to Section 34 by Act of 1976 was that interest could have been awarded only at 6 % and not beyond that rate. Suit filed before the amendment was to be governed by the unamended section. The trial Court, when it passed the final decree in 1989, has awarded interest at the higher rate than 6 %. That matter came up in appeal before this Court. The awarding of interest was not interfered with and on the contrary, it was confirmed by not setting it aside. The matter went up to the Apex

Court. The Apex Court did not interfere with the interest as awarded. In the review filed before the Apex Court that was not challenged. In the review filed before this Court, this was also not raised. The petitioners herein, in fact, after Judgment of this Court in appeal had taken out a review, wherein this point was specifically raised. This review came up for hearing after the Judgment of the Apex Court and was disposed of as infructuous, whereby the contention of the petitioners that interest could not be awarded beyond 6 % has been rejected. It is in that context that the Judgments now cited will have to be examined. The learned Counsel for the petitioners has relied, firstly on the Judgment of the Apex Court in the case of M/s. Shree Bharat Laxmi Wool Store Panipat and ors. v. Punjab National Bank and anr., A.I.R. 1992 SC 521. The issue before the Apex Court was, awarding of interest at more than 6 % in an appeal against the Judgment of the High Court. The Apex Court in paragraph 3 of its Judgment, in appeal, held that the Civil Court had no jurisdiction to grant interest at more than 6 %. That Judgment was not a Judgment in proceedings in execution. Next reliance was placed on the Judgment of the Punjab & Haryana High Court in the case of Taria alias Tara Chand v. Amar Singh and another, A.I.R. 1991 P&H 187. That arose in the proceedings in execution wherein an objection was raised to awarding of interest under

Section 47 of the Code of Civil Procedure. In that case the learned Single Judge interfered with the Judgment, awarding interest holding that the Court had no jurisdiction to award interest more than 6 % and that would render the decree to that extent null and void and consequently limited the interest to 6 %. Reliance was also placed on the Judgment of a Full Bench of Andhra Pradesh High Court in the case of Kudapa Subbanna v. Chitturi Subanna and ors. A.I.R. 1962 A.P. 500. There the issue before the Full Bench was whether mesne profits could be allowed for more than three years from the date of decree. The Full Bench of Andhra Pradesh laid down the well known test that a decree passed by a Court without jurisdiction is a nullity relying on the Judgment of the Apex Court in Kiran Singh v. Chaman Paswan, A.I.R. 1954 SC 340. Reliance was next placed on the Judgment of a learned Single Judge of this Court in Jaimal Shah v. Ila Pandya, 2001 (2) Bom. C.R. 72 to contend that in proceedings for execution, it was open to the executing Court to look into the aspect as to whether the award is within jurisdiction.

5. To decide the controversy, one of the tests would be whether the issue could have been raised in an appeal by the parties. The other is, does a decree passed by a Court of competent jurisdiction, but granting a relief which it could have not granted,

amount to a nullity. In the instant case, it is clear that the parties did in fact raise the issue by filing review petition before this Court. This Court rejected the said petition on the ground that it had became infructuous in view of the Judgment of the Apex Court. The petitioners herein could have raised the issue of interest before the Apex Court. That was also not raised. In other words, though the issue was directly in issue at least in the review petition before this Court, that was rejected whatever may be the grounds. The petitioners did not challenge the order. They had a remedy which was not pursued. The awarding of interest, therefore, became final. It is also not as if a party to a proceedings cannot waive his right to challenge the order. It is always open to the party to do so. Therefore, if the challenge was open and available and party chose not to challenge or give up the challenge, that aspect will have to be gone into while considering the case where admittedly the Court had jurisdiction to try the suit. The limited challenge is that it could not have granted interest at more than 6 %.

The Judgments cited, no doubt lay down a proposition that where a decree is without jurisdiction, then it is a nullity and no decree without jurisdiction can be executed as objections can be raised whenever and wherever, such a decree is sought to be executed or

enforced. In the instant case, it is not the contention that the entire decree is without jurisdiction or that the Court had no jurisdiction. The contention is that the jurisdiction of the Civil Court to award interest was limited by the provisions of Section 34 of the Code of Civil Procedure, before its amendment. The preliminary decree no doubt was passed before the amendment. The suit was filed before the amendment. The Judgment came to be passed after the amendment by which time it was open to the Civil Court to grant interest at more than 6 %. The petitioners herein had preferred S.L.P. before the Apex Court and also filed subsequently a review. The Apex Court while disposing of the S.L.P. and the review petition, did not interfere with the grant of interest. It was open to the petitioners to challenge the issue of interest. They chose not to challenge the same and accepted the Judgments of the trial Court and this Court which are finally confirmed by the Apex Court. A review was preferred before this Court specifically on the point of interest. That review was dismissed. The petitioners did not challenge that order. It has become final. The suit was for dissolution of partnership. The Judgment was passed after the amendment of 1976. At the highest, therefore, the Judgment discloses an error of law. Even otherwise, if the issue could have been raised and was raised and has been rejected that cannot be allowed to

be raised in execution. The issue is not that the Civil Court had no jurisdiction. It is that part of the relief sought, could not have been granted. Once that be the case and the issue was directly in issue at least in the review petition and that petition having been rejected and not challenged by way of appeal before the Apex Court, the issue must stand concluded. A gainful reference may be made to the Judgment of the Apex Court in the case of Ittyavira Mathai v. Varkey Varkey, A.I.R. 1964 SC 907. There the issue before the Apex Court was if a court, having jurisdiction over the parties to the suit and the subject-matter thereof, passes a decree in the suit which was barred by time, would such a decree come within the realm of nullity. The Court answered that such a decree cannot be treated to be a nullity, but at the highest be treated to be an illegal decree. Gainful reference may be made to the following paragraph in the Judgment, which reads thus :

> " If the suit was barred by time and yet the court decreed it, the court would be committing an illegality and therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having jurisdiction over the subject-matter of the suit and over the parties

> thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had jurisdiction over the subject-matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said, courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities."

The House of Lords in the case of McC. (A. Minor), (1985) 1 AC 528, on the issue of nullity, followed the dictum of Lord Coke in Marshalseas case (1613) 10 Co Rep 68b quoting the following passage in Marshalsea case:

> "when a court has jurisdiction of the cause, and, proceeds inverso ordine or erroneously, there the party who sues, or the officer or minister of the court who executes the precept or process of the court, no action lies against them. But

> when the court has not jurisdiction of the cause, there the whole proceeding is coram non judice, and actions will lie against them without any regard of the precept or process..."

From the above, what is clear is that it will be only those cases which can be considered to be nullities where the Court itself had no jurisdiction either over the parties or subject-matter. In the instant case, the Court had jurisdiction. It proceeded at the highest erroneously to award interest. In these circumstances, it is not open for this Court to interfere with the Judgment and the Order passed by the Executing Court in the proceedings arising from an execution application.

In the light of that I find no merit in this petition, which is accordingly rejected. Rule discharged, with no order as to costs.

F.I. REBELLO, J.

ssm.